Supreme Court, U.S.
FILED

0 1165 8 MAY - 7 2002

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

IRVING D. ISKO,

Petitioner,

STATE OF NEW JERSEY,

Respondent,

v.

TERRANCE CARLSON and JEANETTE LEEHR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

DAVID SCHECHNER
SCHECHNER AND TARGAN
Attorneys for Petitioner
80 Main Street
West Orange, NJ 07052
(973) 325-2411

173695

78 pp

QUESTION PRESENTED

When defendants are convicted in a State's municipal court system, and a trial court of that State's Superior Court later reverses the conviction on purely legal grounds, and without any resolution of any factual element of the offense charged, must the determination of whether the Double Jeopardy Clause, Amendment V of the United States Constitution, precludes a further appeal on behalf of the State be based upon the reality of what actually happened in the acquitting court, or must the determination be based upon the theory of what could have occurred in the proceedings before the acquitting court, thus elevating form over substance?

PARTIES TO THE PROCEEDING

Terrance Carlson and Jeanette Leehr, defendants in the criminal action below, are not parties to this action.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ	6
The Judgment of the Appellate Division Creates a Precedent Within New Jersey Which Conflicts with This Court's Well-Established Jurisprudence on the Double Jeopardy Clause	6
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Colten v. Commonwealth of Kentucky, 407 U.S. 104 (1972) 10

Finch v. United States, 433 U.S. 676 (1977) 10

Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984) 10

United States v. Jenkins, 420 U.S. 358 (1975) 10, 11

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 7, 10, 11

United States v. Scott, 437 U.S. 82 (1978) 10, 11

United States v. Wilson, 420 U.S. 332 (1975) 7, 8

United States Constitution:

Fifth Amendment ..... i, 5, 6

Statute:

28 U.S.C. § 2101 1

Cited Authorities

Page

Rules:

Rule 3:23-9(d) 4

Rule 3:23-8 9

Rule 7:8-7(b) 4

Rule 29(c) 11

TABLE OF CITED AUTHORITIES

Page

Appendix A — Opinion Of The Superior Court Of New Jersey, Appellate Division Dated And Filed October 29, 2001 ..... 1a

Appendix B — Court Decision Of Motion For Request For Leave From The Superior Court Of New Jersey Law Division – Morris County, Criminal Part Dated June 30, 2000 ..... 13a

Appendix C — Order Of The Superior Court Of New Jersey, Law Division, Morris County Dated And Filed June 30, 2000 ..... 23a

Appendix D — Order Of The Supreme Court Of New Jersey Denying Petition For Certification Dated February 5, 2002 And Filed February 6, 2002 ..... 25a

Appendix E — Transcript Of Proceedings Dated August 11, 1999 And September 22, 1999 ..... 27a

Appendix F — Transcript Of Municipal Appeal Of The Superior Court Of New Jersey, Law Division, Morris County Dated May 12, 2000 ..... 41a

Appendix G — Order Of The Superior Court Of New Jersey, Law Division, Morris County Reversing Conviction Dated And Filed May 22, 2000 ..... 56a

Petitioner Irving D. Isko respectfully petitions for a Writ of Certiorari to review the Judgment of the Superior court of New Jersey, Appellate Division rendered on October 29, 2001 in this case.

OPINIONS BELOW

The opinion of the Municipal Court of the Borough of Mendham, a municipal corporation of New Jersey, was entered on September 22, 1999. (Appendix ("Pet. App.") 27a to 40a). The action of The Honorable Peter Conforti, Judge of the Superior Court of New Jersey, Law Division, was rendered on May 22, 2000. (Pet. App. 41a to 58a; the court order appears at 56a). The action on the motion of Mr. Isko before The Honorable Reginald Stanton, Assignment Judge of the Superior Court of New Jersey, took place on June 30, 2000. (Pet. App. 13a to 24a; the court order appears at 23a). The opinion of the Superior Court of New Jersey, Appellate Division affirming the decision of Judge Stanton was rendered on October 29, 2001. (Pet. App. 1a to 23a). The decision is published at 344 N.J. Super. 521 (App. Div. 2001). The New Jersey Supreme Court declined to exercise discretionary review of the Appellate Division's judgment on February 6, 2002. (Pet. App. 25a). On that date, the Supreme Court of New Jersey also dismissed an appeal which had been filed in the matter.

STATEMENT OF JURISDICTION

The date when the Supreme Court of New Jersey entered the order which is sought to be reviewed is February 5, 2002. The date when the Superior Court of New Jersey Appellate Division entered the opinion sought to be reviewed here was October 29, 2001. The petitioner invokes this court's jurisdiction under 28 U.S.C. § 2101.

STATEMENT OF THE CASE

This Petition seeks review of a judgment of the Superior Court of New Jersey, Appellate Division rendered on October 29, 2001. By order dated February 5, 2002, the New Jersey Supreme Court declined to exercise discretionary review of the Appellate Division's judgment.

The Appellate Division's judgment warrants this Court's immediate review because the judgment conflicts with this Court's decisions on the application of the Double Jeopardy Clause. The refusal of the New Jersey Supreme Court to exercise its discretionary review of the Appellate Division's judgment deprives petitioner Irving D. Isko ("Petitioner") of any other recourse to vindicate the important federal rights at stake in this case.

This matter arises from the issuance of complaints in the municipal court of the Borough of Mendham (the "Borough")[1], charging defendants-respondents Terrance Carlson and Jeanette Leehr ("Defendants") with violating a municipal zoning ordinance. Defendants' property is in the Borough's 5-acre residential zone. The applicable zoning ordinance expressly prohibits all uses in the zone other than those specifically enumerated in the ordinance.

In early 1999, Defendants began boarding horses belonging to others on their property. The boarding of horses is not an enumerated permitted use under the zoning ordinance. The Borough's zoning officer became aware of the horse boarding in March 1999 and informed Defendants

---

1. The Borough is a duly constituted municipality of the State of New Jersey.

that this activity was a violation of the zoning ordinance. When Defendants failed to comply with the ordinance, a summons was issued to each Defendant for the violation. The matter was then brought before the Borough's municipal court for trial.

Defendants entered into a stipulation of facts with the Borough's municipal prosecutor on the day of the trial. The stipulation was accepted into evidence by that court, and no testimony was taken. The municipal court found Defendants guilty of violating the zoning ordinance, and noted that a resident's keeping of horses that are not owned by the resident is horse boarding, which is not a permitted use.

Defendants then appealed the municipal court convictions to the Superior Court, Law Division in Morris County, New Jersey. The Borough attorney, not the municipal prosecutor, defended the Borough in the appeal. Although that appeal proceeding is denominated in the relevant New Jersey court rule as a *de novo* proceeding, the presiding judge, the Honorable N. Peter Conforti, refused to hear any presentation of evidence because the facts had been stipulated in the Municipal Court.

During the Law Division appeal, there was no presentation of evidence by either party. The transcript reflects that the entire appeal hearing consisted of only a brief colloquy between Judge Conforti and the Borough attorney, followed by the judge's decision to reverse the convictions. The reversal was based solely on Judge Conforti's interpretation of the applicable zoning ordinance: he noted that agriculture is an enumerated and permitted use under the zoning ordinance, and erroneously concluded that the

presence of the horses on Defendants' property constituted agriculture. Judge Conforti expressed his rationale thus:

> This particular case involves this property owner, Mr. Carlson having these horses on his property. And what are the horses doing besides being there? They're eating the hay and the grass. What does that involve . . . if not, an agricultural use with regard to this property?
>
> * * *
>
> The property owner is receiving the benefit of those horses eating what he's producing, which is clearly an agricultural use.

After Judge Conforti reversed the convictions, Petitioner, a complaining witness in the case, and his then-counsel, inquired of the Borough attorney's office whether the Borough intended to appeal the reversal. The response was that the Borough's governing body had decided not to appeal.

Petitioner then filed an application before the Honorable Reginald Stanton in the Law Division of the New Jersey Superior Court to appoint his attorney as a private prosecutor to carry forward the appeal of Judge Conforti's order reversing the convictions. Such appointments are permitted by long-established New Jersey court rules.[2] Judge Stanton

---

2. New Jersey's court rules provide that, in municipal court matters, the Court may permit a private prosecutor to represent the government. Rule 7:8-7(b). In addition, in any appeal to the Superior Court from courts of limited jurisdiction, with the court's consent, "the attorney for a complaining witness or other person interested in the prosecution may be permitted to act for the prosecuting attorney." Rule 3:23-9(d).

denied Petitioner's motion on the ground that even though the facts had been previously stipulated and were not tried before Judge Conforti, a finding of fact was implicit in Judge Conforti's consideration of those stipulated facts when Judge Conforti reversed Defendants' convictions on purely legal grounds. Petitioner appealed that denial to the Appellate Division.

On October 29, 2001, the Appellate Division, affirming Judge Stanton's order, held that the appeal of Judge Conforti's reversal of Defendants' convictions was barred by double jeopardy, and that therefore, Petitioner's application to privately prosecute that appeal was properly denied.

Petitioner filed both a Notice of Petition for Certification and a Notice of Appeal with the New Jersey Supreme Court on November 19 and 27, 2001, respectively. By order dated February 6, 2002, the New Jersey Supreme Court denied the petition for certification and dismissed the appeal without opinion.

Both Judge Stanton and the Appellate Division erroneously concluded that the Double Jeopardy Clause, Amendment V of the United States Constitution, precludes the prosecution of an appeal of Judge Conforti's reversal of the convictions. Underlying this erroneous conclusion of law by both courts is the finding by Judge Stanton that double jeopardy inhered because Judge Conforti had made findings of fact in his disposition of Defendants' appeal of their convictions, even though the record reflects that Judge Conforti refused to make any such findings. Both Judge Stanton and the Appellate Division elevated form over substance by relying on the *rule* designation of the proceeding as *de novo* rather than reviewing and relying upon the record

of that brief proceeding to determine its true character. The record unequivocally demonstrates that Judge Conforti made no finding of fact, but instead made a purely legal determination, when he construed a statute based on facts that had been stipulated in the municipal court below. There is nothing in the record to establish that Judge Conforti made findings of fact when he reversed the Defendants' convictions.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the judgment at issue creates a precedent within New Jersey which constitutes a departure from, and conflicts with, this Court's well-established jurisprudence on the Double Jeopardy Clause, Amendment V of the United States Constitution. Such a departure will have far-reaching implications on criminal and quasi-criminal proceedings in New Jersey, and will create inconsistency, doubt, and confusion. Because the New Jersey Supreme Court has declined to review the case, this important issue of federal rights should be addressed by this Court.

The Judgment of the Appellate Division Creates a Precedent Within New Jersey Which Conflicts with This Court's Well-Established Jurisprudence on the Double Jeopardy Clause.

The Appellate Division's invocation of double jeopardy principles to foreclose any appeal of the Order reversing Defendants' convictions is patently erroneous. Both the Appellate Division and Judge Stanton mischaracterized the nature of the earlier review of the convictions by Judge Conforti, which entailed a purely legal determination, albeit an erroneous one. Both Judge Stanton and the Appellate Division then adopted an interpretation of double jeopardy case law that is untenable.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), this Court explained that double jeopardy bars the State's appeal from an acquittal if the ruling of the judge being appealed actually represents a decision which resolves, correctly or not, some or all of the factual elements of the offense charged. *Id.* at 571. A post-verdict ruling of law, however, is analogous to an appellate court's dismissal of an indictment, which the government has an undisputed right to appeal. *See United States v. Wilson*, 420 U.S. 332, 345 (1975). Consequently, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting the defendant to a second trier of fact. *Id.*

In the instant matter, no witnesses were ever sworn and no witnesses ever testified. In lieu of testimony, the parties had stipulated to all the facts during the initial proceeding in the municipal court. The record reflects that, in the Law Division's review of the municipal court convictions, Judge Conforti took no testimony and refused to make any findings of fact because he was bound by the stipulation. He did nothing more than discuss the Mendham ordinance in the context of the stipulated facts which constituted the findings of fact of the municipal court which convicted the defendants. A review of the transcript of proceedings clearly confirms this:

> THE COURT: . . . The problem that Mendham has, in my judgment, is the stipulation of facts that they presented, which is the record that the Court has to go on here.
>
> * * *

> THE COURT: . . . I'm not going to speculate on what the hearing would have produced by way of testimony. All I'm indicating to you though is my interpretation of the ordinance from these [stipulated] facts. . . . [Pet. App. 52a to 54a].

See also Pet. App. 43a, 46a to 47a, 48a to 51a, 53a to 54a. Thus, the reversal of the convictions did not constitute an acquittal based upon a resolution of any factual element of the matter. The proceeding before Judge Conforti was a reversal of the convictions on purely legal grounds which, for double jeopardy purposes, is regarded as an appellate matter and subject to further review.

In *United States v. Wilson*, 420 U.S. 332 (1975), a jury convicted the defendant of embezzlement. After the verdict and upon defendant's motion, the trial judge dismissed the indictment on an issue of law. The government appealed and the defendant argued that the appeal was precluded by the Double Jeopardy Clause. This Court disagreed, noting that "a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.* at 345.

Judge Conforti's decision, when considered in light of *Wilson*, was not an acquittal but was an appellate reversal of the convictions based solely on a conclusion of law. Thus, the appeal to the Appellate Division in the matter now before this Court did not and does not present a risk of a second trial. The facts below were established by a stipulation entered into and accepted into evidence by the municipal court which convicted the defendants. There is no implication of double jeopardy by virtue of Petitioner's appeal seeking a reversal on purely legal grounds.

The Appellate Division, to support its affirmance of the denial of Petitioner's motion to appoint a private prosecutor, noted that the Law Division proceeding before Judge Conforti, under Rule 3:23-8 of New Jersey's court rules, was *de novo*. Rule 3:23-8 is the rule which permitted, but did not require, Judge Conforti to make a finding of fact in that proceeding. At the heart of the Appellate Division's decision is the conclusion that

> . . . this case is barred by principles of double jeopardy because jeopardy attached when the case was submitted on stipulated facts and terminated in favor of defendants by the fact finder in a trial *de novo* based upon a determination that the defendants were innocent or not guilty.

However, the record of the Law Division proceeding indicates that the case was not submitted on stipulated facts to the court which found defendants *not guilty* but rather to the court which found defendants *guilty*. The Appellate Division opinion does not cite to any fact finding by Judge Conforti that provided the basis for reversing that guilty determination. Indeed, Judge Conforti refused to make such findings. The Appellate Division simply concludes that the proceeding before Judge Conforti is labeled "*de novo*" by the Rule. The Appellate Division does not contradict the point that, in fact, the so-called *de novo* trial did not involve any fact finding because Judge Conforti explicitly ruled that there would not be any fact finding, and that the proceeding would address only the law applicable to the facts as stipulated in the lower court which rendered the guilty verdict.

The proceeding before Judge Conforti was not a trial *de novo*, but, rather, an appeal. Judge Conforti refused to

make any findings or draw any inferences, and rendered only a brief determination. The two opinions of this Court cited by the Appellate Division as to the character of the proceedings are distinguishable, as each involved a plenary hearing *de novo*, which was not the case in the matter before this Court. *See Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 297 (1984), and *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 105-106 (1972).

The Appellate Division relied on *Finch v. United States*, 433 U.S. 676 (1977), to support its assertion that an appeal from a dismissal based on stipulated facts is barred. In *Finch*, the defendant was charged with violating a federal statute and the case was submitted to the district court on stipulated facts. 433 U.S. at 676. The district court dismissed the charges for failure to state an offense based on the stipulation of facts and its interpretation of the governing treaty. The government appealed to the Ninth Circuit Court of Appeals, which reversed the dismissal on the grounds that the only determination to be made, the interpretation of the treaty, was a legal one, and that no further factual proceedings would be required. Holding that double jeopardy barred the government's appeal to the Ninth Circuit, this Court reversed. *Id.* at 677. Despite the Appellate Division's insistence that the holding in *Finch* bars an appeal, *Finch* is entirely distinguishable because in *Finch* there was no finding of guilt in the first instance, whereas here, Defendants were convicted in the first instance by the municipal court.

The Appellate Division also cited *United States v. Jenkins*, 420 U.S. 358 (1975); *United States v. Scott*, 437 U.S. 82 (1978); and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) to support its erroneous conclusion that an appeal of the order reversing Defendants' convictions was barred by double jeopardy. These cases are also distinguishable.

Jenkins and *Martin Linen* involved a dismissed indictment and an acquittal under Rule 29(c) in the first instance whereas the Defendants in the matter before this Court were convicted in the first instance. The *Jenkins* court held that the government's appeal was barred by double jeopardy because further proceedings "devoted to the resolution of factual issues going to the elements of the offense charged" would have been required had the government's appeal been successful. 420 U.S. at 370. As stated above, no such resolution of factual issues would be required in the instant case.

In *Scott*, which overruled *Jenkins*, this Court held that double jeopardy principles are not violated when the government appeals to seek reversal of a mid-trial termination of proceedings favorable to the defendant that is unrelated to factual guilt or innocence of the offense of which he is accused. 437 U.S. at 98-99. Thus, the Appellate Division wrongly determined that the case at bar "embodies a disposition which *Scott* (as well as *Jenkins*) would preclude the State from appealing." None of the cited cases are applicable.

In sum, the Appellate Division erred when it concluded that double jeopardy barred Petitioner's appeal of the order reversing Defendants' convictions. This error requires the Court's consideration so that the Appellate Division's decision will not serve as a precedent to perpetuate misapplication of the Double Jeopardy Clause in New Jersey.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID SCHECHNER
SCHECHNER AND TARGAN
Attorneys for Petitioner
80 Main Street
West Orange, NJ 07052
(973) 325-2411